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CITATIONS

288-393—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC, JEAN NEBBIA; AND ANTHONY SUTERA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 384 F. 2d 889 (Pet. App. A pp. 1a–32a), and the opinion of the district court following a remand for consideration of an issue involving electronic eavesdropping (Pet. App. B pp. 33a–58a), is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1967. The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Harlan to and including December 12, 1967, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the standard announced in *Katz* v. *United States*, No. 35, this Term, decided December 18, 1967, should be applied to cases then pending on appeal.

2. Whether, under the applicable law prior to the time of the *Katz* decision, the district court properly admitted evidence of conversations which were overheard without a physical trespass by placing a microphone next to the crack beneath a doorway separating two hotel rooms.

3. Whether the evidence was sufficient to support the finding of the district court, after a hearing on remand, that trespassory eavesdropping disclosed by the government had produced no information relevant to any of the evidence introduced against petitioners at trial.

STATEMENT

Petitioners were convicted by a jury, in the United States District Court for the Southern District of New York, under an indictment charging that they and one Herman Conder[1] conspired to import narcotic drugs from France and to distribute them in the United States, in violation of 21 U.S.C. 173 and 174. On August 30, 1966, petitioner Desist was sentenced to imprisonment for a term of eighteen years, petitioner Dioguardi for fifteen years, petitioner LeFranc for twenty years, petitioner Nebbia for twenty years, and petitioner Sutera for ten years. The court of appeals affirmed.

[1] The case against Condor was severed prior to trial.

1. The evidence at trial, which is not now in issue, showed that in July 1965 petitioner Desist, a retired United States Army Major living in Orleans, France, offered $10,000 to Herman Conder, a warrant officer at a nearby Army base who was about to be reassigned to Fort Benning, Georgia, if Conder would ship a used food freezer to the United States as part of his household effects. Conder agreed, and Desist delivered to Conder's residence a used freezer in which he had secreted 209 pounds of pure heroin. In late November, after the freezer had been delivered to the house trailer Conder had rented at Fort Benning, Conder wrote a letter to Desist informing him that the freezer had arrived.

On the evening of December 16, Desist and petitioner Nebbia, a French national, both of whom had flown to New York from Paris, met in Nebbia's room in the Waldorf-Astoria Hotel in Manhattan and discussed plans for picking up the heroin in Georgia that weekend. Desist told Nebbia that he first had to fly to Rochester to see "the boss," but would then proceed to Columbus, Georgia, and meet him at a motel. The following afternoon, petitioner LeFranc, also a French national, met Nebbia in the same hotel room, told him to rent a car when he arrived in Columbus the next day, and said that he would wait in a Columbus motel while Nebbia would "take care of things."

That evening, in a Manhattan bar, LeFranc met with the potential buyers of the narcotics, petitioners Dioguardi and Sutera, who had flown to New York from Miami earlier in the day and registered under false names at a Manhattan motel. LeFranc stated

that he would proceed to Georgia the next day with his "friend" to pick up the "merchandise" from his friend's "contact," and would then telephone Dioguardi and Sutera in Miami to arrange for a transfer of the "merchandise" to them. Sutera proposed that he and Dioguardi accompany LeFranc to Georgia to save him the extra trip to Miami, but LeFranc insisted that the matter be conducted as he had proposed.

That same evening, Desist informed Conder in Columbus that two Frenchmen would pick up the contents of the freezer the following day. However, when Nebbia and LeFranc arrived in Columbus, they surmised that they were being followed and decided to postpone the pickup for several more days. They drove back to Atlanta and then flew to New York, where they were arrested the next morning. At about the same time, Conder was arrested in Columbus and the cache of narcotics was seized.

2. Prior to trial, the government informed the district court and counsel for the defense that federal agents had used an electronic device to listen to conversations which had taken place in Nebbia's room in the Waldorf-Astoria Hotel, and suggested that a hearing be held to resolve any question as to the legality of the agents' conduct (R. 3156–3158). A three-day hearing was held on the issue. At the instance of the district court, the proceedings were, at one point, moved to the room of the Waldorf-Astoria Hotel from which the surveillance had been conducted, and the eavesdropping equipment was reinstalled by the agents in precisely the same manner as it had been

at the time of the surveillance (R. 3156–3159, 3206–3226).

The evidence adduced at the hearing showed that on December 11, 1965, petitioner Nebbia was assigned room 1602 at the Waldorf-Astoria Hotel (R. 3447, 3449–3450, 3468–3469). Three days later, on December 14, federal narcotics agents requested a room on the same floor as close as possible to Nebbia's, and were given room 1600 (R. 3427–3434, 3505–3507). Upon entering that room, the agents noted a door in the wall separating room 1600 from room 1602. One agent, Kiere, opened the door and found a second door immediately behind it (R. 3438, 3510). Another agent, Smith, placed his ear momentarily against the second door, heard nothing, then closed the first door (R. 3511–3512, 3525, 3527–3528).[2]

Later that afternoon, Agent Durham of the Bureau of Narcotics arrived at room 1600 with a tape recorder and other electronic equipment (R. 3392–3395, 3423, 3430). Kiere pointed out the doorway leading to room 1602, and stated that there was a second door behind the first (R. 3415–3417). Durham proceeded to lean a small microphone against the base of the door in room 1600 with its face tilted toward the three-eighth inch space between the bottom of the door and the top of the door sill (R. 3417–3420). No part of the microphone or any other apparatus extended into or under the first door (R. 3419, 3441). Durham fixed the microphone in place with adhesive tape, then, in order to minimize its sensitivity to any sounds

[2] There is no evidence in the record to suggest that the first door was ever opened by the agents again.

in the agents' room, placed a bath towel over the microphone along the clearance space between the door (R. 3211–3213; Gov. Exs. 3, 4). Durham ran a cable from the microphone into the bathroom in the agents' room, where it was plugged into an amplifier which was connected to a tape recorder (R. 3210–3211, 3218; Gov. Exs. 1, 2). The tape recorder could be operated manually, or by a voice actuated switch which would turn on the recorder whenever the sounds entering the microphone reached a certain level (R. 3223, 3225). Any matter being recorded could be heard simultaneously on a speaker (R. 3215, 3222).

Thereafter, from the afternoon of December 14 through December 18, Agent Kiere, who was fluent in French, operated the equipment manually to overhear and record conversations which took place in Nebbia's room, including the conversation between Nebbia and Desist on December 16 and the conversation between Nebbia and LeFranc on December 17 (R. 3214–3216, 3225–3226). During the surveillance, Nebbia's room was never entered by the agents, the second door was never opened, and no equipment was attached to that door (R. 3404–3405, 3424, 3430–3433, 3438, 3441–3442, 3478, 3493, 3514, 3528–3529, 3748, 3756–3758, 3771, 3776).

At the conclusion of the hearing, the district court found that no physical trespass was involved in the eavesdropping, and denied the defense motion to suppress the evidence thereby obtained (R. 3778–3782). Evidence of the conversations was thereafter admitted at trial (R. 371–378, 553–627).

3. After petitioners had been convicted and while the case was pending on appeal, the government advised the court of appeals that a review of the case had disclosed two instances of trespassory electronic surveillance, one involving petitioner Dioguardi in Miami in 1962, and one involving petitioner Nebbia in Columbus on December 18, 1965 (R. 4777–4778). Neither instance, the government stated, produced relevant information (R. 4778). The court of appeals remanded the case to the district court for a hearing on the nature and effect of the eavesdropping on those two occasions, and any other such occasion (R. 4930, 4945).

On remand, the district court held extensive evidentiary hearings—covering over 800 pages of transcript (R. 3912–4737)—at which testimony was heard from fourteen witnesses, all but two of whom were government agents. In addition, logs of the Miami conversations were made available to the court, and the relevant portions were introduced in evidence (see Pet. App. B pp. 36a, 44a–45a). Documents involved in the government's internal review of the eavesdropping were furnished to the court and the defense (see Pet. App. B pp. 47a–51a).[3]

The evidence presented at the hearing showed that in 1962 the F.B.I. installed an electronic eavesdropping device by trespass in a restaurant near Miami, Florida, in connection with an investigation of a per-

[3] The district court declined to reopen inquiry into the Waldorf-Astoria eavesdropping since the issue had been explored thoroughly prior to and during trial (see Pet. App. B pp. 37a–38a).

son having no involvement with the present case. In operating the device, agents of the F.B.I. heard several conversations in which petitioner Dioguardi was identified as a participant. None of the conversations had any bearing on the present case (see Pet. App. B pp. 41a–45a). The evidence also showed that in Columbus, Georgia, on December 18, 1965, federal narcotics agents installed an electronic eavesdropping device in an automobile belonging to a car rental agency, and that later that day the automobile was rented to petitioner Nebbia. The listening device malfunctioned, however, and produced only static and unintelligible noises. The agents abandoned attempts to use it and proceeded only with visual surveillance (see Pet. App. B pp. 45a–46a).

After hearing all of the evidence, the district court, in a detailed opinion, concluded that the Miami and Columbus incidents "had no relevance to any of the evidence introduced at the trial or to the conviction of any of the defendants" (Pet. App. B p. 56a). It further held that the defendants had failed to establish that there was "any other electronic eavesdropping related to this case"[4] or that "any of the evidence used against them at the trial was tainted by any invasion of their constitutional rights" (Pet. App. B p. 57a).[5]

[4] As to the testimony of two defense witnesses through whom the defense sought to establish various investigative improprieties by federal agents in Columbus, the district court found that "[v]iewed most charitably, this testimony does not rise to the level of credible evidence" (Pet. App. B p. 51a).

[5] The court also found that the office of the United States Attorney for the Southern District of New York had no knowledge of either the Miami or Columbus incidents at the time of trial (Pet. App. B pp. 45a–46a).

ARGUMENT

In *Katz* v. *United States*, No. 35, this Term, decided December 18, 1967, this Court held that where a person conducting a conversation which he "seeks to preserve as private" has "justifiably relied" upon the privacy afforded by a public telephone booth, eavesdropping by electronic means upon that conversation without a warrant, even where no physical trespass is involved, constitutes an unreasonable search and seizure within the meaning of the Fourth Amendment and the evidence so obtained may not be used at trial. If the principle announced in *Katz* is to be applied to cases pending on appeal on the date of that decision, the affirmance of petitioners' convictions cannot stand.[6] We urge, however, that, under the criteria announced by this Court in weighing the propriety of retrospective application of newly announced constitutional standards, application of the *Katz* holding to prior cases is not warranted.

In recent cases discussing the possible retroactivity or non-retroactivity of constitutional rules of criminal law, this Court has stressed the necessity of assaying the particular situation before it by considering the purpose of the new standards, the reliance of law enforcement authorities upon the old standards, and the effect upon the administration of justice of a retroactive application of the new standards. *Stovall* v. *Denno*, 388 U.S. 293, 297; *Johnson* v. *New Jersey*, 384 U.S. 719, 727; *Tehan* v. *Shott*, 382 U.S. 406, 413; *Linkletter* v. *Walker*, 381 U.S. 618, 636.

[6] We note, however, that no rights of petitioners Dioguardi and Sutera were violated by the overhearing.

The reliance of law enforcement authorities upon prior law in this area is apparent. The distinction between an electronic eavesdropping which does not involve a physical trespass into a constitutionally protected area, and an electronic eavesdropping which does involve a trespass, was drawn by this Court in *Goldman* v. *United States,* 316 U.S. 129, and *Silverman* v. *United States,* 365 U.S. 505. See *Lopez* v. *United States,* 373 U.S. 427, 438–439. The lower courts have been uniform in applying that distinction. Only a week prior to the agents' installation of the eavesdropping equipment in this case, this Court denied a petition for a writ of certiorari to review a Second Circuit decision affirming, on the basis of *Goldman,* the propriety of a virtually identical installation by the same narcotics agent. *United States* v. *Pardo-Bolland,* 348 F. 2d 316, certiorari denied, 382 U.S. 944 (December 6, 1965). In that case, Agent Durham had taped a small microphone against the clearance space beneath a door separating two hotel rooms, just as he later did in this case. In each instance, care was taken that there was no penetration into or under the door; the microphone was simply placed so as to pick up the sounds coming under the door. The agents certainly had no cause to anticipate that the same type of installation found constitutionally permissible in the *Pardo-Bolland* case might not be held permissible when employed a short time later. However appropriate the recent abandonment of the trespass distinction, the "operative fact" (*Linkletter* v. *Walker,* 381 U.S. 618, 636)

is that the agents' conduct was not an intentional evasion of a known constitutional standard.[7]

The purpose to be served by the new standard announced in *Katz* is to deter law enforcement agents from electronically monitoring conversations which a subject seeks to preserve as private and reasonably assumes to be private, except where judicial sanction is first secured. The deterrent aspect of the *Katz* rule can only affect situations arising after that decision. Retroactive application of the *Katz* rule can not change the fact that law enforcement officers, relying on *Goldman,* have in the past used non-trespassory devices to overhear conversations. Moreover, the type of evidence obtained here is of the highest probative value. This is not a situation where infringement of a right—such as denial of the right to counsel at a trial—can be said to have involved "the integrity of the truth-determining process at trial". *Stovall* v. *Denno,* 388 U.S. 293, 298.[8]

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[7] In this respect, the situation presented here is far more compelling than that which faced this Court in *Linkletter* v. *Walker, supra.* See *Johnson* v. *New Jersey,* 384 U.S. 719, 731; *Tehan* v. *Shott,* 382 U.S. 406, 417. There the conduct of the state agents was known to be constitutionally forbidden at the time it occurred, and the only question was whether the exclusionary rule announced in *Mapp* v. *Ohio,* 367 U.S. 643, was to be given retroactive effect. Although the sole reliance of the state authorities was not upon the propriety of the means of obtaining evidence, but upon the admissibility of evidence unlawfully obtained, retroactive application of the rule was still denied.

[8] In the *Stovall* case, the standard announced in *United States* v. *Wade,* 388 U.S. 218, was denied retroactive application despite the fact that a defense counsel's presence at a lineup may permit a more meaningful examination at trial as to the basis and accuracy of a witness' courtroom identification. Here, the argument against retroactive application is even more persuasive.

While, in volume, the effect upon the administration of justice of a retroactive application of the standard announced in *Katz* would not be of the same dimensions as that discussed in *Stovall* or in *Johnson* v. *New Jersey*, 384 U.S. 719, electronic surveillance has played a role in cases of major significance.[9] This case dramatically illustrates the point. The quantity of pure heroin seized exceeded 200 pounds—acknowledged by petitioners to be the largest cache ever captured in this country (Pet. p. 3). The *Pardo-Bolland* case, noted at page 10 above, involved approximately 136 pounds of heroin (see 348 F. 2d at 318).

Moreover, in denying retroactive application, there is no reason to distinguish between convictions which were final on the date of the *Katz* decision and those which were then still in the appellate process. While in some instances a newly announced rule was applied to cases then pending on appeal (see *Linkletter* v. *Walker*, 381 U.S. 618, 622 n. 4; *Tehan* v. *Shott*, 382 U.S. 406, 409 n. 3),[10] this Court later emphasized that

[9] The difficulty in obtaining evidence by the more common means against major figures in the organized crime field, and the corresponding importance of electronic surveillance in such cases, has been noted by the President's Commission on Law Enforcement and Administration of Justice in its report entitled *The Challenge of Crime in a Free Society*, pages 198–199, 201–203.

[10] In this respect, the fact that *Mapp* involved the Fourth Amendment, as did *Katz*, is not determinative or even relevant. As this Court has emphasized in discussing retroactivity generally (*Stovall* v. *Denno*, *supra*, at 297; *Johnson* v. *New Jersey*, *supra*, at 728):

> [T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional

such applications were made "without discussion" and before the general problem was actively considered. *Johnson* v. *New Jersey*, 384 U.S. 719, 732; see Schaeffer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. Law Rev. 631, 644–646 (1967). Since those decisions, this Court has held that no distinction is justified between convictions which were final at the time of the pertinent opinion and convictions which were then at various stages of trial and direct review. *Johnson* v. *New Jersey*, *supra*, at 733; *Stovall* v. *Denno*, 388 U.S. 293, 300–301.

2. Under the law applicable prior to the time of the *Katz* decision, the district court did not err in admitting evidence of the monitored conversations. After a thorough evidentiary hearing during which the electronic equipment was displayed, reinstalled, and explained, the court found that the monitoring of the hotel room did not involve a trespass (R. 3778–3782). There was thus no reason to exclude the evidence of the conversations.[11]

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rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.

[11] Petitioners asserted for the first time in the court of appeals, and now assert before this Court, that by placing an ordinary microphone next to the clearance space beneath one of two doors separated by an airspace there is created, in effect, a parabolic microphone (Pet. pp. 21–22). The assertion has no basis in physics, no foundation in the record, and no relevance in law. Their more general assertion, that such a structure containing an airspace is designed to enhance privacy, and yet was utilized instead as a means of invading privacy (Pet. pp. 23–25), similarly lacks evidentiary support

Petitioners, however, attack the district court's finding of fact. They contend that, contrary to all the testimony at the pretrial hearing, the microphone must have been located in petitioner Nebbia's room rather than the agents' room, because, if located in the latter, the microphone would have picked up sounds of the agents using their short wave radio, telephone, typewriter, and tape playback mechanism, yet no "perceptible amount" of such sounds was recorded by the sound-actuated tape recorder. (Pet. pp. 31–33). The contention is fully answered by the record. The microphone, which was placed next to the floor on the agents' side of the first door, was shielded from sounds originating in the agents' room both by a mask of adhesive tape and by a folded bath towel (R. 3211–3213; Gov. Ex. 3, 4). Moreover, instead of being operated by the sound-actuated switch, the recorder was operated manually by Agent Kiere (R. 658–660, 668–670, 3215–3216, 3225–3226). The short-wave radio, typewriter, and tape playback mechanism were not used while a conversation was being recorded (R. 693, 700–704, 857–858, 930–932); in the few instances where the telephone was used during a recording the tape con-

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as well as relevance. Moreover, the *Pardo-Bolland* case, in which there was a single door between the two rooms, demonstrates the immateriality of an airspace to the functioning of such equipment as was here employed. In any event, certainly there is no reason to accord an airspace separating two doors any more legal significance than an airspace between the studs separating the exterior surfaces of a wall. See *Goldman* v. *United States*, 316 U.S. 129.

tained such noises (see *e.g.* R. 293–296). There is thus no reason to question the finding of the district court.[12]

3. There is no merit to petitioners' allegation that the evidence at the hearing on remand was insufficient to support the district court's finding that no information relating to this case was obtained from any trespassory electronic surveillance (Pet. p. 7). The testimony of the defense witness Kennington, on which petitioners rely, was confused, uncertain and contradictory. Although he had stated at one point that he had overheard narcotics agents in Columbus say they had used a radio transmitter in a car to hear unspecified converstions, he denied this at another point of the hearings.[13] The district court concluded that, considering the substance of Kennington's testimony and his contradictions, demeanor, and general ability to recall past events, the testimony, "charitably" viewed, did not rise "to the level of credible evidence" (Pet. App. B. p. 51a). The court expressly rejected Kennington's testimony in favor of the "clear and unequivocal" testimony of the government agents (Pet. App. B. p. 56a; see *id.* at pp. 40a–41a). This determination of credibility plainly does not call for review by this Court.

Petitioners' further claim that "despite the *apparent* thoroughness of the remand proceeding" they

[12] Petitioners' argument (Pet. pp. 35–38) concerning the President's policy directive of June 30, 1965, to which the government alluded in the *Schipani* case, affords no reason for excluding from evidence the hotel room conversations overheard in this case. As we have noted previously, the overhearing involved no impropriety under existing law.

[13] The district court's resumé of Kennington's vascillations and admitted confusion appears at Pet. App. B. pp. 51a–53a.

were "cut off from any real opportunity to probe the [government's] * * * 'proof'" (Pet. p. 38), is totally unsupported. Petitioners were given several postponements in the hearing in order to conduct an independent investigation (R. 3923–3924, 3945, 3960–3963, 3972, 3981–3982, 4007–4008, 4199–4201, 4211–4212, 4229–4231, 4239–4242, 4369, 4377, 4379, 4581–4584), they were afforded access to the pertinent government records (see Pet. App. B. pp. 45a, 47a–51a), and they examined and cross-examined the government agents involved. In what way they were improperly "cut off" from legitimate inquiry is not specified.[14]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[14] Petitioners have raised, but have not argued, several additional issues (Pet. 7–9). Each of these contentions has been adequately answered in the opinion of the court of appeals.

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